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MONTANA'S CONSTITUTIONALLY ESTABLISHED INVESTMENT PROGRAM:

A State Investing Against Itself*

Wendy A. Fitzgerald**

Montana's 1889 Constitution contained dozens of sections detailing an extremely conservative scheme for the investment of Montana's public funds.¹ The 1972 Constitutional Convention replaced the 1889 provisions with a single section unifying the investment of all Montana trust funds under a single state agency. The convention's Revenue and Finance Committee majority report provided no more than legislative supervision of investments and the unified program. The minority report also endorsed unifying state investments, but advocated retaining from the 1889 Constitution a prohibition on investment in corporate common stock for all but state retirement trust funds. The minority prevailed on the convention floor, and its plan—still vastly simplified from the 1889 version—now governs the investment of Montana's more than 2.6 billion dollars in various trust funds.² That provision reads in pertinent part:

The legislature shall provide for a unified investment program for public funds and provide rules therefor, including supervision of investment of surplus funds of all counties, cities, towns, and other local government entities. . . . Except for monies contributed to retirement funds, no public funds shall be invested in private corporate capital stock.³

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1. See MONT. CONST. of 1889, arts. XI, XII, XXI; Montana Constitutional Convention Commission, *Montana Constitutional Convention Occasional Papers, Report No. 5, Comparison of the Montana Constitution with the Constitutions of Selected Other States* (1971) [hereinafter *Comparison of the Montana Constitution*] for a compilation of the 1889 trust fund and investment provisions.

2. STATE OF MONTANA BOARD OF INVESTMENTS, 1987-1988 FISCAL YEAR REP. 1 (1988) [hereinafter BOARD OF INVESTMENTS].

3. MONT. CONST. art. VIII, § 13.

This constitutional provision commands our attention because 2.6 billion dollars in investment funds has vast potential for good or for ill.

The convention debate over the two proposals synthesized several strains of Montana's character and history. In this article I examine the major historical influences on the convention's deliberations; by turn, progressivism, populism, and conservatism. I then contrast the delegates' vision for state investment with its actual implementation. Although the convention approved a plan of public accountability, instate investment, and preventing state conflicts of interest, the actual program has failed to realize these hopes. At fault, however, is perhaps not our constitution, but a failure of our confidence as a people to control the use of our state capital resources.

I. PROGRESSIVE INFLUENCES

Montana's progressive political tradition grew from the "progressive era" in American history spanning the turn of the century.⁴ Slum housing, malnutrition, poverty, child labor, and exploitive working conditions blighted the national landscape.⁵ Reformers of the era identified unresponsive government and the massing of wealth and power in business trusts and monopolies as the roots of these social evils.⁶ Indeed, big business controlled many aspects of local, state, and national government through the firm grip of corruption.⁷ Government, reformers believed, could not even moderate the ill effects of industrialization until government was returned to the people.⁸ The chief tenet of progressive political reform, therefore, was to restructure government to shield it from corruption and to grant sway to the popular will. In state and local politics, progressives across the nation achieved such lasting reforms as centralization, the popular election of senators, and public regulation of utilities.⁹

In Montana, progressives waged a bitter struggle against the chokehold the Anaconda Company maintained on Montana state government, press, and labor.¹⁰ In 1920, the progressive Joseph M.

4. S. MORRISON, H. COMMAGER & W. LEUCHTENBURG, A CONCISE HISTORY OF THE AMERICAN REPUBLIC 499 (1977) [hereinafter MORRISON].

5. *Id.* at 499-509.

6. *Id.* at 500.

7. *Id.*

8. *Id.*

9. *Id.* at 508-10.

10. See K.R. TOOLE, TWENTIETH CENTURY MONTANA: A STATE OF EXTREMES 233-71

(1972) [hereinafter TOOLE].

Dixon won a divisive campaign for the governor's office and attempted to implement many of the reforms other states had achieved. In his State of the State address to the 1921 Legislature, Dixon proposed sweeping tax reforms and legislative--reapportionment designed to loosen Anaconda Company's hold on the state.¹¹ Through several of Dixon's proposals, such as centralizing state purchasing, appointing an independent and professional state Board of Equalization, and streamlining state bureaucracy, Dixon hoped to restructure government itself to insulate it from the Company's influence and to assure democratic control.¹² Labelling Dixon a "radical" and a "liar," the Company's lobbyists discredited Dixon and easily defeated his reforms.¹³ Montana's era of progressivism ended, and little changed in Montana government for the next several decades.¹⁴

The history of the state's investment programs reflects the consistent defeat of progressive reform in Montana until the 1970s. From 1924 through 1971, by constitutional amendments, legislative efforts, and finally executive directive, progressives strove to centralize and to regulate the administration and investment of Montana's many trust funds.¹⁵ A growing and disjointed state bureaucracy comprised of 188 different agencies, each jealously guarding its autonomy, had frustrated these efforts.¹⁶ By 1969, eighteen different boards or commissions administered Montana trust funds, employing different and virtually unregulated accounting methods and strategies.¹⁷ The Constitutional Convention Commission reported to the 1972 Revenue and Finance Committee, "Of the thirty-three accounts invested, a yield was reported for only four; the state had no idea what kind of total return it was making on its investments."¹⁸

By the 1972 Constitutional Convention, however, progressivism had resurfaced in Montana. On the national scene, progressives railed against state bureaucracy as incomprehensibly big and shamefully inefficient.¹⁹ Echoing their progressive ancestors, the

11. *Id.* at 255-58.

12. *Id.* at 257-58.

13. *Id.* at 264.

14. *Id.* at 271.

15. R. Barber, Montana Constitutional Convention Studies: Report No. 15, *Taxation and Finance* 237-38 (1971) [hereinafter Barber].

16. J. LOPACH, *WE THE PEOPLE OF MONTANA . . . THE WORKINGS OF A POPULAR GOVERNMENT* 115-16, 176-78 (J. Lopach ed. 1983) [hereinafter *WE THE PEOPLE*]; Barber, *supra* note 15, at 237.

17. BARBER, *supra* note 15, at 238-39.

18. *Id.* at 239.

19. *WE THE PEOPLE*, *supra* note 16, at 174-76.

reformers of the 1960s and 1970s advocated the restructuring of government to eradicate corruption and incompetence and to assure responsiveness to people's needs and desires. In forty-one states, progressives achieved some form of government reorganization during these decades.²⁰ In Montana, the 1969 Legislature appointed an executive reorganization commission, which reported that "the executive branch has grown into a cumbersome, fragmented and haphazard collection of autonomous agencies. . . . Comprehensive reorganization . . . is necessary to insure that government will be maintained in an efficient and responsive manner."²¹ Concerned not only for efficiency, but also for public participation in government, the commission advocated reform because "it [was] impossible for the electorate to meaningfully fix definitive and true responsibility anywhere for the administration of governmental affairs."²² Responding to the commission report, by constitutional amendment in 1970 and legislative and executive order in 1971, Montana completely overhauled its state bureaucracy.²³

The 1971 reforms streamlined state government and strengthened the governor's authority over the executive branch.²⁴ The reforms included consolidating the administration and investment of all state funds under a single Board of Investments.²⁵ Like Dixon's progressive proposal for an independent and professional Board of Equalization free of corruption and incompetence, the law mandating the new Board of Investments required gubernatorial appointment, so members would be "informed and experienced in the field of investments."²⁶

Although the legislature had finally accomplished these progressive reforms a year before the constitutional convention met, the delegates feared a return to Montana's past history of an unconstrained state bureaucracy and unregulated investment program. Delegates forcefully described on the convention floor the inefficiencies, and indeed irresponsibility, found in the past administration of state trust funds.²⁷ When the Chairman introduced the Revenue and Finance Committee's majority report, therefore, he argued for conferring constitutional certainty on the recent re-

20. *Id.* at 176.

21. *Id.*

22. *Id.* at 177.

23. *Id.* at 116, 177-78.

24. *Id.* at 177-78.

25. Barber, *supra* note 15, at 237.

26. *Id.*

27. V MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPTS 1529 (1981) [hereinafter TRANSCRIPTS].

forms. Said Delegate Rygg, "The Committee feels the importance of unity, professional treatment and supervision of all public fund investments should be stressed at the constitutional level."²⁸

Constitutional establishment of a unified state investment program was but one aspect of the convention's progressive efforts to reform permanently the state bureaucracy. Other constitutional provisions, for example, limited bureaucratic growth to twenty executive departments,²⁹ placed the executive branch firmly under the governor's control,³⁰ and assured public participation in executive agency decision-making.³¹ In these provisions too, the convention gave constitutional importance to recently enacted progressive reforms of the state bureaucracy. These constitutional revisions, like the unified investment program mandate, reflected the progressive desire to achieve professional and efficient management of state government.

Because of the seeming daunting complexity of the financial world, professional management of state investments struck some delegates to the convention as particularly important. Several of the delegates expressed their personal mystification about investments and their desire to entrust state funds to financial experts.³² Of the twenty or so delegates who spoke on the investment proposal, several rose just to ask questions, and many qualified their remarks by disparaging their financial knowledge.³³ The Chairman of the Revenue and Finance Committee himself seemed to sum up many of the delegates' attitudes when he explained why he had participated so little in the debate. "I recognize when I have talent," Delegate Rygg said, "and I yield to the affluent man and the banker when it comes to talking about investments. We listened for hours to the Investment Board; we feel [the trust funds are] in good hands."³⁴

In part to assure that professional expertise would guide Montana's investment strategy, the majority report of the Revenue and Finance Committee recommended abolishing the investment prohibitions of the 1889 Constitution in favor of legislative supervision.³⁵ The committee had learned that although other states' constitutions included mild investment restrictions, Montana's

28. *Id.* at 1516-17.

29. MONT. CONST. art. VI, § 7.

30. MONT. CONST. art. VI, § 8.

31. MONT. CONST. art. II, § 8.

32. V TRANSCRIPTS, *supra* note 27, at 1522, 1523, 1529-30.

33. *Id.* at 1523.

34. *Id.* at 1530.

35. *Id.* at 1518.

1889 Constitution was the only attempt to prescribe constitutionally a specific investment program.³⁶ The committee had learned further that wherever the 1889 Constitution had locked state funds into government bonds, for example, yields had suffered from inflation and missed opportunities in other investment vehicles.³⁷ Calling the 1889 investment structure "obsolete" and citing examples of sister states with five times the rate of return Montana had enjoyed, delegates urged permitting the legislature to establish an investment program administered by financial experts.³⁸ Explained Delegate Heliker, "[W]e do not have the picture before us of the Legislature sitting down and actually doing this investment itself. It will turn the job over to experts. And it seems to me that this is the way it should be handled and that we should not try to freeze [any investment restrictions] into the Constitution."³⁹

No one challenged unifying state investment funds constitutionally, the chief progressive contribution to the proposed provision. The proposal to free all investment funds from constitutional restrictions and to submit those funds to legislative supervision, however, sparked controversy. The convention ultimately adopted the committee's minority proposal to prevent the investment of all but pension funds in corporate common stock.⁴⁰ That constitutional restriction defeated the progressive move to permit total flexibility in state investment. The opponents of flexibility did not represent special interests as had the foes of progressive ideas in Montana's past. Rather, the debate over restricting state investment turned on delegates' attitudes toward two other forces in Montana's history, populism and Montanans' struggle to eke a living from this land.

II. POPULIST INFLUENCES

The majority's proposal to abolish constitutional restrictions on investment and to permit legislative establishment of investment programs forwarded the progressive principle of government accountability to the people. Advocates of the majority report echoed this populist strain of progressivism when they argued that

36. See generally *Comparison of the Montana Constitution*, *supra* note 1; Barber, *supra* note 15, at 252.

37. Barber, *supra* note 15, at 240-54.

38. V TRANSCRIPTS, *supra* note 27, at 1517, 1528.

39. *Id.* at 1526.

40. MONT. CONST. art. VIII, § 13. The convention concluded that state employees ought to decide for themselves whether to invest their retirement funds in common stock. V TRANSCRIPTS, *supra* note 27, at 1529, 1537.

a legislature accountable to the people of Montana should determine how to invest their public funds. Remarked Delegate Joyce:

I am willing to trust the people of Montana who they'll elect to the Legislature. If they elect people to the Legislature that are crooks, we can turn back the course of history and we can resurrect the vigilante committees and hang some people from the Capitol dome. . . . But I'm not afraid of the future or afraid of the people of Montana, and I submit the progressive majority report . . .⁴¹

The convention debate, then, turned to who should control the state's capital resources: the experts, the legislators, the people, or the constitution. While progressives had long fought for the popular control of government, populists had long fought for the control of capital. Indeed, the convention debate on control of state capital recalled to some delegates Montana's populist history.

Political populism arose on the national scene in the agricultural west after the American Civil War. Grangers and Farmers' Alliance members learned to overcome economic hardship through cooperatively owned enterprises such as grain elevators and reaper factories.⁴² By 1890, the Farmers' Alliances had spawned a platform and candidates to carry their political message.⁴³ These populists advocated the substitution of government for bank control of currency, a graduated income tax, public ownership of utilities and railroads, and public financing for farmers.⁴⁴ The populist movement remained a national minority, but was a creative influence in American politics until World War II.⁴⁵

In Montana, populism never grew as strong as in North Dakota, for example, where the movement achieved a state bank. In 1914, however, Montana voters passed a ballot initiative dedicating a portion of the constitutionally established School Land Trust Fund for investment in first mortgages in Montana farms.⁴⁶ Although the impetus for "Farm Loan Law" may have been the homesteading boosterism of the pre-drought years, the law nonetheless was populist in placing the capital of the people under the control of the people for the benefit of the people. Between 1917 and 1933, the program eventually extended over four million dol-

41. V TRANSCRIPTS, *supra* note 27, at 1530.

42. MORRISON, *supra* note 4, at 434.

43. *Id.* at 437.

44. *Id.* at 437-39.

45. *Id.* at 439.

46. Toole County Irrigation Dist. v. State, 104 Mont. 420, 432, 67 P.2d 989, 992 (1937).

lars in loans to Montana farmers.⁴⁷

Politically, Montana populism reached its zenith in 1920 when the state's populist Non-Partisan League grew to 20,000 members.⁴⁸ Angry farmers filled these ranks after three years of devastating drought, over a hundred agricultural bank closures, and a failed state bond program to employ drought-stricken farmers building county roads.⁴⁹ Free of the strong-arm tactics the Anaconda Company used to intimidate labor, the farmers of the Non-Partisan League openly challenged the state's taxation policies, which impoverished counties and enriched the Company.⁵⁰ The Non-Partisan League backed Jeannette Rankin's successful congressional bid, but its support of Burton K. Wheeler's failed gubernatorial campaign against the more moderate Dixon marked the end of the League's political influence in Montana.⁵¹ The Company press excoriated Wheeler as "Bolshevist Burt" for his Non-Partisan League ties and painted the contest between Dixon and Wheeler as "a matter of freedom versus Socialist slavery."⁵² The anti-socialist hysteria that eventually crushed the populists politically in Montana was the vanguard of the early "red scare" nationally.⁵³

The Depression dealt the death blow to the populist Farm Loan program. By 1935, the program had lost every penny of the more than four million dollars loaned⁵⁴ as Montana farmers suffered their second decade of dustbowl-creating drought. The exodus of Montana homesteaders continued.⁵⁵ Bound by the 1889 constitutional provision declaring the School Land Trust Fund "inviolable," the 1935 Legislature acknowledged the state's responsibility for the lost funds.⁵⁶ The legislature began a repayment program from taxes of all the principal and interest lost in the disaster.⁵⁷ It was not until 1953 that the School Land Trust Fund finally recouped all the funds lost in the Farm Loan program.⁵⁸

No delegate to the 1972 Constitutional Convention argued

47. *Id.* at 432-38, 67 P.2d at 992-94; V TRANSCRIPTS, *supra* note 27, at 1540.

48. TOOLE, *supra* note 10, at 241.

49. *Id.* at 241.

50. *Id.* at 241-42.

51. *Id.* at 235, 238-48.

52. *Id.* at 247.

53. Montana's repressive Sedition Law became the model for national legislation in 1918. *Id.* at 155.

54. Toole County Irrigation Dist. v. State, 104 Mont. 420, 437, 67 P.2d 989, 994 (1937).

55. See TOOLE, *supra* note 10, at 80-81.

56. Toole County Irrigation Dist., 104 Mont. at 437-38, 67 P.2d at 994.

57. *Id.* at 438, 67 P.2d at 994.

58. V TRANSCRIPTS, *supra* note 27, at 1540.

openly or consciously for popular control of state investment capital, but supporters of the minority proposal to prohibit investment in common stock nonetheless advanced populist themes. When Delegate Artz introduced the minority report on the floor, he presented it as a constitutional scheme for investment priorities: "[N]umber one, security; number two, *that the funds should be invested in Montana as much as possible*; and that the final consideration is the return on the investment. . . . [K]eep the money in Montana."⁵⁹ Delegate Artz thus stressed security of trust fund principal as the first priority, but made investment of public capital within the state a higher priority than profit. Like his populist predecessors, Delegate Artz sought to secure public capital for the benefit of the people through investment in Montana enterprises. Delegate Artz further proposed that the constitution prohibit investment in common stock so that the legislature would not face a conflict of interest by serving as both a shareholder in and regulator of Montana industries.⁶⁰

The debate then turned to the wisdom of freezing an investment plan into the constitution. Some delegates expressed the progressive version of populism by supporting supervision of state investments by the legislature.⁶¹ The minority proposal, expressed populism at its most fundamental by attempting to assure popular control of and popular benefit from state capital in the state's organic law.

Proponents of the majority proposal repeatedly stressed the ability of expert financiers to increase state funds in the stock market.⁶² Delegates rising in support of the minority report, however, expressed a kind of populist distrust of experts and legislators both. None felt constrained to qualify his or her remarks with apologies for lack of financial expertise. Rather, they seemed to assume that ordinary citizens were competent to make investment decisions, indeed were perhaps more competent than experts or legislators. Time and again the proponents of the minority report cited historical examples of experts' costly folly—tulip bulb investments, real estate speculation, and the 1929 crash—and their fear that experts could "pressure" the legislature into such risky ventures unless a constitutional ban prevented them.⁶³ Again Delegate Artz summed up the case against experts when he observed:

59. *Id.* at 1519 (emphasis added).

60. *Id.* at 1519-20.

61. *See, e.g., id.* at 1525, 1529-30.

62. *Id.* at 1525, 1528-30.

63. *Id.* at 1519, 1522, 1531, 1532-33, 1534-35.

Mr. Drum said we could get good investment counsel and that that would insure us that we wouldn't lose any money in the stock market. Now, I've put some money in mutual funds, and they supposedly have real good investment counsel; they have computers and analyze the market and the whole thing. But look at their record, even the best of them. Some of them barely kept up with the Dow-Jones, and some of them went broke.⁶⁴

Distrust of the touted experts and faith in their own common-sense ability to design a state investment program to benefit Montanans were populist sentiments the minority report advocates unwittingly expressed.

The convention's adoption of the minority proposal was clearly an endorsement of the populist instate investment scheme Delegate Artz had outlined. The language of the minority report failed to express this intent, however, and thus accomplished no more than prohibiting the investment of all but state pension funds in common stock.⁶⁵ To the extent that the delegates expressed approval of using Montana state capital for Montanans and exercised their own popular control rather than leaving investment decisions to the experts, however, the convention reflected and affirmed Montanans' historical populist character. Other provisions in the 1972 Constitution indeed manifested the convention's populist viewpoint. Provisions for popular sovereignty, the right to know and to participate in government processes, direct democracy through ballot initiatives, and the mandate for periodic review of the constitution itself all reflected Montana's populist spirit.⁶⁶

III. THE INFLUENCE OF CONSERVATISM AND THE LAND

The decisive arguments in the convention debate over the majority and minority proposals expressed telling attitudes toward holding a legacy of funds in trust for future generations and Montana's experience with an economy dependent on resource extraction. Proponents of the majority report spoke of their belief in an expanding American economy that would realize great returns in the future if the state could but seize opportunities in flexible investment strategies.⁶⁷ Delegate Drum voiced these sentiments in patriotic tones when he concluded:

64. *Id.* at 1537.

65. MONT. CONST. art. VIII, § 13.

66. WE THE PEOPLE, *supra* note 16, at 10-11.

67. V TRANSCRIPTS, *supra* note 27, at 1525, 1529-30.

But I think it really all boils down to this: the American system of private enterprise ain't too bad. It's a growing economy. There may be losers, and there are a lot of winners. But if we have faith in that economy and are willing to allow our people [via the legislature] to make the decision of whether they want to participate in the growth of the American economy, I think this Constitution should allow them that latitude.⁶⁸

Delegate Drum's words epitomize the "frontier optimism" that propelled early pioneers into the western wilderness and still characterizes Americans as expansive, fast-paced, "go-ahead" people.⁶⁹

More persuasive to the convention delegates, however, was Montana's own history of economic "boom and bust." Supporters of the minority report argued that a constitutional prohibition on common stock investment might slow growth, but it would also protect state trust funds from the kind of disastrous losses the state had experienced throughout its history.⁷⁰ Delegates repeatedly referred to the "homestead boom collapse" of the 1920s and 1930s, which forced the state to repay School Land Trust Fund principal loaned under the Farm Loan Program.⁷¹ Indeed, over the decades since statehood each of Montana's resource-based industries—agriculture, mining, and timber—had raised Montanans' hopes high during the booms, only to dash them and Montanans' standard of living during the busts.⁷² Shortly before the constitutional convention met, the University of Montana's Bureau of Business Research issued the first comprehensive study of Montana's economy, revealing per capita income fourteen percent below the national average, a projection of a further seven percent decline by 1980, and the conclusion that the state was "economically stagnant."⁷³ Delegates painting a rosy economic future of growing investment funds could not overcome the hard-learned pessimism of most.

Rather than risk trust funds in flexible investments, most delegates voiced the simple desire to preserve and protect them. Responding to criticism of the slow growth of Montana trust funds, Delegate Romney said, "I want to be sure that we don't lose anything. I'm not so concerned about gaining as I am keeping what we have And that is why we must scrupulously guard this inheri-

68. *Id.* at 1530.

69. R. BILLINGTON, *AMERICA'S FRONTIER HERITAGE* 225-26 (1974).

70. V TRANSCRIPTS, *supra* note 27, at 1519, 1522-23, 1524, 1527, 1531, 1532-33, 1534-35, 1537, 1539-40.

71. *Id.* at 1534, 1539-40.

72. TOOLE, *supra* note 10, at 284-85.

73. *Id.* at 282.

tance. . . ."⁷⁴ Delegate Romney's words captured a predominant theme of the constitutional convention and of Montana public discourse since. One author in the newly published Montana literary anthology has observed:

Innocence and self-destructiveness converge in today's Big Sky country with its awareness of being the end of a tradition, the last best place *Having lost so much, how can we keep the little that is left?* This the unspoken fear behind public policy debate in Montana, from concerns about protecting the wilderness, the water, and the air to promoting free enterprise, economic development, trade, and growth.⁷⁵

Delegates to the 1972 convention were keenly aware of how much Montana had lost from its resource extraction economy. Although boosters promised great returns from the investment of Montana's resources—be they financial or natural—Montana's experience is that of steady depletion.⁷⁶ Travelling to the convention across a state scarred by sod busting, clear cutting, and strip mining, the delegates arrived determined to preserve what was left of Montana's natural legacy. When debating investment of Montana trust funds, then, the delegates seemed to equate the funds with the land itself. Though the School Land Trust is but a part of Montana's investment pool, delegates often referred to that fund as representative of the whole. "I'm sure glad that we didn't sell that school section that [we were] going to get the great amount of money on," replied Delegate Mahoney to promises of greater returns on investments. Supporting the minority proposal, he continued, "And, thank goodness, we had farsighted people that wasn't looking for the dollar and getting that; that they says, '*We'll just hang on.*'"⁷⁷ The delegates saw themselves as heirs of Montana's mountains, streams, plains, and trust funds. Their first concern, then, was to "just hang on," to pass these resources to future generations undiminished if also unincreased. The constitutional provisions for reclamation and protection of the environment and natural resources⁷⁸ could serve equally to represent the convention's attitude about Montana trust funds. As Delegate Artz said in introducing the minority proposal, the first priority was to secure the

74. V TRANSCRIPTS, *supra* note 27, at 1524-25.

75. Blew, *Frontier Dreams*, in THE LAST BEST PLACE: A MONTANA ANTHOLOGY 633 (W. Kittredge & A. Smith ed. 1988) (emphasis in original).

76. TOOLE, *supra* note 10, at 281-82.

77. V TRANSCRIPTS, *supra* note 27, at 1534 (emphasis added).

78. MONT. CONST. art. IX, §§ 1, 2.

principal, and the second was to "keep the money in Montana."⁷⁹

Montana's history, the delegates recalled, was of continually compromising its natural and human resources for economic gain. Fear of perpetuating that cycle furthered the minority proposal to ban investment in common stock. Without such a ban, Delegate Artz reasoned, under the minority scheme for instate investment, the state would own stock in Montana corporations.⁸⁰ The possibility then arose that Montana would own stock in a company for which the state had also required air-pollution controls. Playing the role of company spokesperson, Delegate Artz challenged the convention, "'Now here, listen here, fellows, we cannot go ahead and put in all of this necessary equipment to keep those fumes down; if we do, you're not going to get any return on your investment.' What position would that put the Legislature in?"⁸¹ In approving the minority proposal banning investment in common stock, the convention thus hoped to prevent testing the legislature with a devil's choice between profits for state trust funds and further degradation of Montana's lands. When faced with such a devil's choice in the past, Montana often had selected the profits, countenancing the scarred landscape only to see the profits ultimately flee the state anyway.⁸²

IV. IMPLEMENTATION OF THE CONSTITUTIONALLY ESTABLISHED INVESTMENT PROGRAM

For the convention delegates, Montana's history had shaped its new constitutionally established investment program. Progressive elements had achieved a program accountable to the public and safe from corruption, centralized under the government's administrative arm. Populist elements had prioritized state investments so that Montana's capital resources would benefit Montanans. Further, the people retained ultimate control of their capital through their constitution. Finally, the conservative elements prevailed to hold Montana's funds in trust for future generations, preventing difficult choices between tempting gains and risk to the principal and the land itself. In part because the actual provision they wrote failed to express the convention's investment scheme, however, the delegates' vision has foundered.

First, the convention specifically rejected arguments favoring expert control of investments so increased growth might provide

79. V TRANSCRIPTS, *supra* note 27, at 1519.

80. *Id.* at 1519-20.

81. *Id.* at 1520.

82. See TOOLE, *supra* note 10, at 281-82, 287-88.

tax relief.⁸³ Instead, the convention sought first to secure investment funds and second to invest them in Montana. Given the final wording of the constitutional investment provision, however, the legislature has implemented the very program the convention rejected. A joint interim subcommittee reported to the 1985 Legislature, "Maximum enhancement of earnings . . . is the objective of the investment program because every dollar earned for state government is one that taxpayers will not have to contribute."⁸⁴

Second, the convention specifically rejected expert control of state investment funds because it doubted experts' ability to invest those funds both safely and for the benefit of Montana. The legislature, however, has assured "expert" control of Montana investments by imposing the "prudent expert standard" on the investment of state funds.⁸⁵ The prudent expert standard seems innocuous enough, requiring that the Board of Investments act with the "care, skill, prudence, and diligence" of a prudent expert.⁸⁶ The prudent expert standard, however, imposes on Montana investment strategies both the perspective of a Wall Street financier and the narrow investment criteria of securing the principal and maximizing returns. The standard thus thwarts the vision of the 1972 convention in three critical areas: public accountability, instate investment, and conflicts of interest.

A. Public Accountability

Centralization of state investment programs now makes it possible for Montanans to know where and how their state funds are invested, but the "prudent expert" standard frustrates the power of that knowledge. In theory, the constitutional right to know dovetails with another guarantee, the right of Montanans to participate "in the operation of the agencies prior to the final decision"⁸⁷ No citizen can meaningfully participate in Board of Investments operations and decisions, however, as long as the Board must heed only its expert counsel.

In October of 1985, for example, the Board of Investments agreed to meet with the Montana Peace Legislative Coalition to hear its proposal for divestment of state funds from companies do-

83. Delegate Drum, advocate for the losing majority report, outlined the same investment plan the legislature now pursues. TRANSCRIPTS, *supra* note 27, at 1529-30.

84. JOINT INTERIM SUBCOMMITTEE NO. 3, EFFECTIVE MANAGEMENT OF STATE INVESTMENTS: A REPORT TO THE 49TH LEGISLATURE 8 (Dec. 1984).

85. MONT. CODE ANN. § 17-6-201 (1989).

86. MONT. CODE ANN. § 17-6-201 (1989).

87. MONT. CONST. art. II, § 8.

ing business in South Africa.⁸⁸ Before the meeting, the Board consulted its experts and heard that divestment might "transgress the prudent expert rule."⁸⁹ The Board therefore voted on a resolution prior to meeting with the Coalition not to divest state funds from South Africa.⁹⁰ When Coalition members objected to the Board's deciding the issue before hearing their presentation, the Board granted them another hearing.⁹¹ After that hearing, the Board re-adopted its previous resolution. The Coalition members then unsuccessfully sued the Board for violation of their constitutional rights to know and participate.⁹²

The Coalition's experience illustrates the futility of exercising constitutional rights to participate in investment decisions governed solely by the prudent expert standard. Under that standard, the Board of Investments not only need not, but also must not respond to citizens' concerns, and instead must respond only to the prudent expert. The standard is thus anti-democratic, removing investment decisions from public debate and consigning them to nonpersuadable experts. The convention delegates rejected the rule of financial experts over state investment programs. Legislative implementation of the constitutional investment provision—including the statutory prudent expert standard—has insulated the state investment agency from meaningful public participation, however.

B. *Instate Investment*

The minority proposal that the convention finally adopted also spelled out investment priorities first to secure the principal of state trusts, second to invest in Montana, and only last to achieve return on investments. The constitutional provision itself, however, failed to reflect these priorities. Eleven years of legislative struggles passed before an overwhelmingly popular ballot initiative in 1983 established an instate investment program.⁹³ Meanwhile, the dictates of the national capital markets, heeded by the prudent experts, had always deprived Montana businesses of necessary capital.⁹⁴

88. *Montana Peace Legislative Coalition v. Reber*, No. CDV-85-1214, Op. and Order at 3 (Mont. 1st Judicial Dist. Mar. 3, 1986).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* The right to know and the right of participation are found within Montana's Declaration of Rights at MONT. CONST. art. II, §§ 9, 8 respectively.

93. MONT. CODE ANN. §§ 17-6-301 to -331 (1989).

94. See TOOLE, *supra* note 10, at 286-87.

Indeed, the prudent expert standard still functions to keep most of Montana's money out of Montana. The 1983 initiative earmarked but twenty-five percent of one trust, the Coal Tax Trust Fund, for instate investment.⁹⁵ As of 1988, therefore, Montana had invested only 163 million of its 2.6 billion dollars in public funds within its borders.⁹⁶ The Board of Investments devoted the vast majority of the 163 million dollars invested instate to providing a secondary market for Montana home mortgages.⁹⁷ Small, indigenous Montana businesses qualifying under the instate investment initiative received less than eight million dollars in state loan commitments.⁹⁸ Only abrogation of the prudent expert standard in the legislation enabling instate investment made the capital available to Montana businesses at all.⁹⁹

Montana's resource extraction economy, long at the mercy of national and international swings,¹⁰⁰ compels a more concerted instate investment program, as the convention delegates realized. Big businesses hardly require Montana's comparatively paltry state capital resources, and Montana cannot hope to compete with other states in the nationwide "race to the bottom" in providing lures for big business relocation here.¹⁰¹ Montana can, however, provide badly needed capital and other support to its own small businesses, small businesses which in fact employ most Montanans. Recalling the disaster of the School Land Trust Fund Farm Loan program, Delegate Artz insisted that Montana's trust principal remain secure. A concern for security has not deprived Montana small businesses of capital resources, however. Rather, the prudent expert standard's requirement for maximizing profits keeps Montana capital from Montana use. Were the legislature to abide the convention's investment scheme, it would redefine return on investments as strengthening Montana's home-grown economy.

C. Conflicts of Interest

The convention delegates hoped that a constitutional limit permitting investment only in fixed yield bonds would prevent a state conflict of interest between ownership in and regulation of

95. MONT. CODE ANN. § 17-6-305 (1989).

96. BOARD OF INVESTMENTS, *supra* note 2, at 2.

97. *Id.*

98. *Id.* at 2, 7.

99. MONT. CODE ANN. § 17-6-309 (1989).

100. See TOOLE, *supra* note 10, at 286-87.

101. See Note, *Problem With State Aid to New or Expanding Businesses*, 58 S. CAL. L. REV. 1029 (1985).

corporations operating in Montana. Of course, the constitutional safeguard does not apply to investment of state retirement funds, which comprise over fifty percent of Montana capital assets.¹⁰² Moreover, although the limit frees the rest of Montana trust funds from threats of immediate loss of yield from a security should state regulation adversely affect the issuing corporation's earnings, it fails to prevent Montana from investing against its own interests. Whether the state invests in stocks or bonds, Montana investments represent significant state financial support for those corporations chosen for investment¹⁰³ and Montana investments help further those corporation's policies. Montana invests against its own interests, for example, when it on the one hand espouses certain environmental or human rights policies and on the other invests in any corporation regardless of the corporation's environmental or human rights practices. The prudent expert standard, blind as it is to every investment criteria except security and maximizing returns, now results in "facially neutral" and hence socially unscrupulous investment strategies. Three examples illustrate this result, but analysis of Montana's investment portfolio undoubtedly would reveal other socially questionable investment decisions.

First, in 1982 Montana voters passed a ballot initiative declaring their opposition to "any further testing, development, or deployment of nuclear weapons by any nation."¹⁰⁴ Although the people of Montana established firm state policy against nuclear weapons testing, development, and deployment, the Board of Investments followed only its prudent expert standard. By 1985, then, Montana had invested 73 million dollars in nuclear weapons manufacturers.¹⁰⁵ To invest in nuclear weapons manufacturers robs substance from the people's declared opposition to nuclear weapons testing, development, and deployment. The Montana Peace Legislative Coalition therefore supported a bill in the 1985 Legislature to divest from Montana's portfolio twenty-six nuclear weapons manufacturer holdings then comprising about five percent of the portfolio.¹⁰⁶ The Board of Investments lobbied heavily against the bill, arguing it contravened the prudent expert standard.¹⁰⁷

102. BOARD OF INVESTMENTS, *supra* note 2, at 13.

103. See *Huber v. Groff*, 171 Mont. 442, 558 P.2d 1124 (1976) for discussion broaching though not specifically addressing this concern.

104. MONT. CODE ANN. § 90-5-211 (1989).

105. *Hearings on H.B. 645*, 49th Leg. (Testimony of B. Turk Feb. 15, 1985) [hereinafter Turk].

106. H.B. 645, 49th Leg. (1985) (sponsor of the Bill Mike Kadas); Turk, *supra* note 105.

107. See Fiscal Note to H.B. 645, 49th Leg. (1985).

The Board of Investments prevailed, and so it remains seemingly free to thwart Montana's antinuclear policy through its investment strategies.¹⁰⁸

The Board of Investments' arguments before the 1985 Legislature betrayed more of a concern for agency autonomy—that innate attribute of bureaucracy the progressive 1972 Constitution had attempted to curb—than for sound financial management. As the Coalition pointed out, nuclear weapons divestment would have diminished potential diversification by eliminating only 250 of the 6,350 companies listed on major American securities exchanges.¹⁰⁹ Moreover, while the Board of Investments complained of the transaction expenses associated with selling the twenty-six holdings in controversy, its own annual report revealed that in three months the Board had conducted as many transactions as the divestment bill would have required over three years.¹¹⁰ Finally, the Board could advance scant evidence to suggest that divestment from nuclear weapons manufacturers would diminish returns. Rather, the experience of other states' and cities' socially responsible investment programs showed no adverse effects on portfolio earnings.¹¹¹ It appears, then, that the Board of Investments raised the prudent expert standard as a shield against public involvement in its decisions rather than as a sound financial principle on which to oppose divestment.

Even had the Board shown that divestment contravened the prudent expert standard by diminishing portfolio earnings, under the 1972 Constitution it remains a legislative prerogative to sacrifice the potential for earnings in favor of implementing other state policies. The convention itself clearly rejected maximizing returns as the overriding criterion for investment decisions. Rather, after assuring the safety of the principal, the most important criterion for convention delegates was the advancement of state policies such as Montana economic growth and pollution control.

Second, overriding constitutional concerns should have compelled divestment from South Africa regardless of the possible breach of the prudent expert standard. The 1972 Constitution absolutely prohibits discrimination on the basis of race.¹¹² The Board of Investments could not comply with this constitutional prohibi-

108. Note that Montana also has invested in nuclear-energy utilities although state policy forbids the development of nuclear energy in Montana.

109. Turk, *supra* note 105, at 1 and studies cited therein.

110. *Id.* at 2.

111. See *id.* at 3 and studies cited therein.

112. MONT. CONST. art. II, § 4.

tion and yet grant Montana financial support to companies operating in the South African apartheid system. Nonetheless, and as in the case of nuclear weapons, the Board of Investments argued that the prudent expert standard precluded divestment from South Africa.¹¹³ As of 1985, Montana had 228 million dollars, about ten percent of its trust assets, invested in companies doing business in South Africa.¹¹⁴

As in the case of nuclear weapons divestment, convincing financial evidence refuted Board of Investment arguments and showed that divestment, if anything, might strengthen the safety of Montana's investment portfolio.¹¹⁵ Indeed, Montana's financial implication in apartheid has declined as corporations voluntarily ceased their South African operations.¹¹⁶ Even were divestment to result in diminished returns, however, fidelity to Montana's constitutional equal rights provision should have mandated divestment. Montana's declaration of human rights is ephemeral when Montana's capital supports known violators of human rights.

Third, the Board of Investments pursues investment strategies inimical to Montana's economic well-being. In its 1987-1988 Fiscal Year Report, the Board of Investments proudly announced the investment of 25.3 million dollars of Montana's capital assets in "the rapidly growing and highly-rewarding" field of leveraged buy-outs.¹¹⁷ The Board invested these funds with a firm that participated in the leveraged buy outs of Stop & Shop, Seaman's Furniture, and Duracell, as well as the bankruptcy proceedings of Texaco.¹¹⁸ New leveraged buy-out targets included Beatrice, Motel 6, Owens-Illinois, and Safeway.¹¹⁹ As the Board observed, shareholders can realize tremendous profits during leveraged buy outs from the liquidation of company assets usually required to finance the buy out.¹²⁰

The dismemberment of a corporation through the sale of assets to finance a buy out certainly realizes short-term gains for shareholders. As critics have noted, however, these asset sales also result in plant closures that devastate communities and workers dependent upon the continuing operations of a corporation for

113. Penner, *Investment Implications of South Africa Divestiture: Report to the Montana Board of Investments* (Feb. 8, 1985).

114. Turk, *supra* note 105, at 1.

115. *Id.*

116. *Id.*

117. BOARD OF INVESTMENTS, *supra* note 2, at 6.

118. *Id.*

119. *Id.*

120. *Id.*

their livelihood.¹²¹ From bitter experience with the Anaconda Company, other mining operations, forest product corporations, and railroads, Montana has learned the cruel effects of plant closures dictated by outside financial concerns. For Montana to participate in leveraged buy outs sure to engender such cruel effects is an economically foolish as well as inhumane investment policy. Convention delegates worried about Montanans' propensity to risk long-term devastation in return for short-term profit. The safeguards the convention wrote into the constitution have failed to curb this historical cycle, however, as the Board of Investments pursues immediate return on investments without regard for future adverse effects on Montana workers and communities.

V. TOWARD A NEW, CONSTITUTIONAL INVESTMENT POLICY

Though the convention failed to institutionalize its detailed investment priorities in the constitution itself, convention philosophy permeates the document sufficiently for Montanans to demand on constitutional grounds that the state radically alter its investment policies. First, Montanans can assert the progressive elements of the constitution to force meaningful public participation in state investment decisions. Second, the populist elements of the document compel repeal of the prudent expert standard so that popular will and not expert financiers' criteria can determine state investment policies. Once freed from the anti-democratic prudent expert standard, Montana's investment program yet requires firm checks against state conflicts of interest and popular follies endangering trust fund principal. The conservative elements of the constitution provide part of those checks through the assertion that Montanans hold funds as they do lands, in trust for future generations. Other provisions, such as the constitution's declaration of human rights, provide further checks against state conflicts of interest. All three branches of Montana state government should heed these constitutional imperatives when deciding on proposals to alter the state investment program.

The prudent expert standard has prevented Montanans from controlling and benefiting from their own capital assets. As a result, Montana's investment portfolio is a picture of a state investing against its own interests and policies. Repeal of the prudent expert standard likely will not suffice to reinvolve Montanans in state investment decisions, however. Although Montanans have

121. See Andre, *Tender Offers for Corporate Control: A Critical Analysis and Proposals for Reform*, 12 DEL. J. CORP. L. 866, 876-77 and accompanying notes (1987).

well-proved their willingness to discuss and often to fight over most other public policy issues, financial and economic policies remain beyond most people's sense of personal competence. Yet, in order to vitalize their declared inalienable rights—to "a clean and healthful environment, . . . enjoying and defending their lives and liberties . . . and seeking their safety, health and happiness"¹²²—Montanans must assert control of their capital resources. Our constitution already provides the means for democratic control of our state resources. What we need now is the confidence in ourselves to wield the power over our capital resources that our constitution provides. To build that self confidence, we must again reject the tyranny of financial experts and assert our common, democratic sense.

122. MONT. CONST. art. II, § 3.